IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC04-49

v.

TFB File No. 2001-00,356(8B)

ROLAND RAYMOND ST. LOUIS, JR.,

Respondent.
_____/

REPLY BRIEF AND ANSWER BRIEF ON CROSS APPEAL

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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending suspension for 60 days, probation for 3 years with pro bono and additional CLE ethics hours, and forfeiture of $2,277,633.00 to The Florida Bar's Client Security Fund under a 10-year payment plan and to pay costs, and further seeking review of the referee's failure to find guilt of Rule 4-1.7(a) (Representing Adverse Interests).

Complainant will be referred to as The Florida Bar, or as The Bar. Roland Raymond St. Louis, Jr., Respondent, will be referred to as Respondent, or as Mr. St. Louis throughout this brief.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to specific pleadings will be made by title. Reference to the transcript of the final hearing are by symbol TR, followed by the volume, followed by the appropriate page number. (e.g., TR III, 289).

References to Bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number (e.g., TFB Ex. 10).

The issues in this brief use the same numbers as set forth in Respondent's Amended Answer Brief and Initial Brief on Cross Appeal for ease of comparison.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Florida Bar relies upon its Statement of the Case and Statement of the Facts as set forth in its Initial Brief.

SUMMARY OF ARGUMENT

The referee's recommended discipline falls short of the discipline warranted by Respondent's misconduct in light of 1) prior decisions of the Florida Supreme Court and other State Courts and 2) The Florida Standards for Imposing Lawyer Sanctions.

The referee's failure to find guilt of Rule 4-1.7(a) (Representing Adverse Interests) was clearly erroneous.

The referee's findings of guilt as to all other rule violations are correct and should be approved.

ARGUMENT

While the referee's fact findings are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support, The Florida Bar v. Vining, 707 So.2d 670, 672 (Fla. 1998), the referee's recommended discipline is afforded a broader scope of review. This Court has stated, however, that a recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law." Vining at 673 (quoting The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997). The Florida Bar intends to show that the recommended discipline in this case is not supported by existing case law, nor by The Florida Standards for Imposing Lawyer Sanctions, and also that the referee's failure to find guilt of Rule 4-1.7(a) (Representing Adverse Interests) is clearly erroneous.

The Florida Bar also intends to show that the defenses raised by Respondent have no merit.

ISSUE I

RESPONDENT LIED TO THE FLORIDA BAR IN HIS LETTER RESPONSE TO THE FLORIDA BAR'S 1997 INITIAL INQUIRY BY ELENA EVANS, BAR COUNSEL

The referee found Respondent guilty of violating Rule 4-8.1(a) (Knowingly Make a False Statement of Material Fact) and Rule 4-8.4(c) (Engage in Conduct Involving Misrepresentation) because he lied to The Florida Bar in his January 14, 1997, letter response to Elena Evans, Bar Counsel, who was conducting an initial inquiry during the previous 1997 investigation.

In his letter of January 14, 1997, Respondent made the following statement: "It is therefore disappointing that Mr. Ossinsky would continue to insist that we have withheld some kind of 'documentation' relating to the settlement negotiations; we simply cannot furnish him with what does not exist" (RR, 29). Mr. Ossinsky had demanded that Respondent furnish all documents to the settlement to his clients (RR 24, 25).

The referee further found that the statement was false in that the secret side agreement did exist and it had not been disclosed to Mr. Ossinsky or The Florida Bar. He also found that Respondent knew his statement was false and that it was a statement of fact which was material to the investigation being conducted by Elena Evans (RR, 29).

In his brief, Respondent argues, as he did before the referee (TR 13, 1611-1616), that the statement was true in that he had intended them to relate only to certain portions of the informal complaint by Mr. Gilley. Respondent's position is unreasonable and false.

Respondent admitted to the referee that he did not want to disclose the secret agreement (TR 13, 1620), and that there were two complaints against him at the time (TR 13, 1757).

In The Florida Bar v. Spears, 786 So.2d 516 (Fla. 2001), the Court inferred a duty of disclosure under similar circumstances. Referring to misconduct on the part of Spears involved in what is referred to as "the Carey matter" which had occurred prior to a disciplinary consent judgment having been entered in an earlier case, but which was unknown to the Bar at the time of the earlier consent judgment, the Court stated

> We can only conclude that Spears was in the best position to have brought the Carey matter to the Bar's attention, and that the exclusion of the Carey matter from the consent judgment case is solely attributable to Spears' failure to conduct himself in a most upstanding manner at a time when he was under investigation for multiple and serious violations of the Rules of Professional Conduct. (Id at 520)

There can be no doubt that Respondent and his partner were in the best position to have brought the secret side agreement matter to the Bar's attention, and that the exclusion of the secret side agreement matter from the 1998 consent judgment is solely attributable to Respondent's failure to conduct himself in a most upstanding manner at a time when he was under investigation for multiple and serious violations of the Rules of Professional Conduct.

As the Court stated in Spears,

> (T)he very nature of the lawyer-client relationship requires that clients "place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other

> economic relationships." The Florida Bar v. Dancu, 490 So.2d 40, 41-42 (Fla. 1986). Spears had already violated this trust by committing the misconduct detailed in the consent judgment, and we view the Carey matter to be an additional, egregious example of cumulative misconduct for which greater discipline must be imposed. (Id at 521)

When Respondent entered into the secret side agreement with DuPont, he violated the trust placed in him by his clients just as surely as did Spears.

Respondent cites the case of Susan Tixel, Inc. v. Rosenthal & Rosenthal, Inc., 842 So.2d 204, 209 (Fla. 3d DCA 2003) as setting forth a test for fraud and misrepresentation. That case is a civil case involving fraud in the inducement and misrepresentation in a suit by a wholesaler against its factor.

Rule 4-8.1 involves no such test and requires a much higher duty of a lawyer to be candid with the Bar (TFB 54, 48-53). In Florida, a lawyer has a duty to be precise in his language to inquiries by the Bar, The Florida Bar v. Titone, 522 So.2d 822 (Fla. 1988).

The Florida Bar is not clairvoyant and did not know that the secret side agreement existed. Respondent did know that he had signed the document and that it did exist. In his statement, he flatly stated that other documents did not exist.

The referee heard the testimony of Respondent on this issue, was able to judge his credibility, and found that Respondent knew that he had other documents (TR 15, 1962), including the secret side agreement, and that Respondent's statement to Elena Evans was a misrepresentation (TR 15, 1979).

There is ample evidence in the record to support the findings of the referee.

ISSUE II

THE REFEREE CORRECTLY FOUND THAT RESPONDENT LIED BY OMISSION TO THE FLORIDA BAR AT THE MEETING IN INVERNESS

The referee found Respondent guilty of violating Rule 4-8.1(b) (Failure to Disclose a Fact Necessary to Correct a Misapprehension) and Rule 4-8.4(c) (Engage in Conduct Involving Misrepresentation) because he was under a duty to tell the Bar about the secret side agreement at the meeting in Inverness and did not do so (RR 33, 34).

Rule 4-8.1(b) states that a lawyer, in connection with a disciplinary matter, shall not:

> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 4-1.6.

The Comment to Rule 4-8.1 clearly states that the rule may be violated by an omission in connection with a disciplinary investigation of the lawyer's own conduct. An omission is an additional way that Rule 4-8.1 can be violated (TFB 54, 49, 50).

Rule 4-8.1(a) and Rule 4-8.1(b) impose an affirmative duty upon lawyers to conform to a very high standard of truthfulness and candor in order to maintain the integrity of this self-regulating profession.

In Florida, a knowing omission to state a material fact (not just a direct outright lie) is a false representation. Titone, supra. The Florida Bar v. Webster, 662 So.2d 1238 (Fla. 1995).

The referee found that "there is no question that when Mr. St. Louis went there, he knew that he had that document and did not want to divulge it, and I do believe there was a misapprehension and I do believe he should have and he was happy to get out of there with that misapprehension intact the same after he left as before he got there" (TR 15, 1958, 1959). "I am just going to find a violation of 4-8.1(b) because I think he had a duty to disclose it" (TR 15, 1959).

In his Report, the referee found that "By his own omission to show the Engagement Agreement to Joan Fowler, Respondent has violated Rule 4-8.1(b). Respondent created a misapprehension in the mind of Joan Fowler by his omission to show the Engagement Agreement to her. He had a duty to show the Engagement Agreement to Joan Fowler" (RR, 34). He had a duty to volunteer the Engagement Agreement to Joan Fowler (RR, 34) (TR III, 318).

Joan Fowler was also under a misapprehension that she had seen all the documents in the box (RR, 32) (TR III, 297, 302). She believed Respondent. Respondent never revealed the existence of the secret agreement to Joan Fowler or Jeannette Haag (RR, 32). Respondent knew that it was relevant to the investigation (RR, 34) (TR XIV, 1760). The referee also found that the secret side agreement was material to the investigation and that Respondent knew it at the time (RR, 34).

Respondent attempts to rely upon the confidentiality of the secret side agreement as an excuse for not revealing it to Joan Fowler, just as he tried to use it as an excuse for not telling the clients about the secret side agreement. He may not rely upon one rule in order to violate another rule. The confidentiality envisioned by Rule 4-1.6(e) is not applicable to these facts. The referee so found (RR, 24, 25).

There is substantial, competent evidence in the record to support the referee's findings.

ISSUE III

RESPONDENT MADE DELIBERATE MISREPRESENTATIONS OF MATERIAL FACT TO JUDGE THOMAS S. WILSON, JR.

Respondent did not misspeak. He intentionally lied to Judge Wilson. The referee found him guilty of violating Rule 4-3.3 (Candor Toward the Tribunal) and Rule 4-8.4(c) (Engage in Conduct Involving Misrepresentation). He lied not once, but twice at the same hearing.

Mr. Sheehee and Mr. Vendittelli had represented Dale and Carolyn Smith in a Benlate matter. The settlement negotiations failed. Sheehee and Vendittelli filed a charging lien against Respondent and Respondent had entered into a confidential settlement agreement with them (which contains a restriction on the right to practice), alleging that he had violated the confidentiality provisions thereof in discovery during the malpractice suit. Defendants moved to disqualify Respondent because of a conflict of interest alleging that he could not represent the Smiths.

Respondent, at a hearing on May 19, 2000, concerning the disqualification issue, told Judge Wilson that "it would be improper and certainly unethical of me to enter into an agreement never to sue them on behalf of anyone else. An agreement to restrict my practice is prohibited by the Bar rules" (TFB 3A, 72).

Respondent, knowing that it was material to the conflict of interest issue, failed to disclose the existence of the secret side agreement to Judge Wilson (RR, 35). Respondent knew at the time that he had entered into the secret side agreement with DuPont in his

own settlement of his Benlate cases. That was clearly material to the inquiry of Judge Wilson because Respondent himself had done what he told Judge Wilson that he could not do.

Thereafter, Judge Wilson discovered the existence of the secret side agreement and the prior consent judgment regarding the $59,000.00 settlement and he asked Respondent how he could go to The Florida Bar and not give that information. In response, Respondent said, "I disclosed to The Florida Bar at the time I was questioned every piece of information, every document at my disposal" (RR, 35) (TFB Ex. 3D, 5). That statement was a clear, unambiguous complete denial of wrongdoing. Respondent alleges that he misspoke. The referee found that the statement was false and that he knew that it was false (RR, 36). The words "every piece of information" and "every document at my disposal" are telling in that they are obviously completely false. He knew the secret side agreement was in the box at Inverness and that he had not disclosed it. The referee found that he lied to the Bar by omission concerning the failure to disclose the document to the Bar (RR, 34). Judge Wilson was correct in concluding that Respondent had lied to the Bar at Inverness.

The referee also found that the statement was material to the inquiry of Judge Wilson concerning the conflict of interest issue. The referee found that the restriction on the right to practice became material during the hearings as that issue arose in the settlement agreement concerning the charging lien (TR 15, 1964). How could it not be material to his inquiry? Respondent had previously done the same kind of practice

restriction that he had entered into regarding the charging lien settlement originally at issue in the motion to disqualify. The secret side agreement indicates that Respondent had agreed to represent DuPont, the present adversary of his clients, Dale and Carolyn Smith (TR I, 111). The issue, at that point before Judge Wilson, was whether or not Respondent had entered into a practice restriction (TR I, 96).

Respondent did not stop there, but lied again to Judge Wilson at the same hearing when Judge Wilson asked Respondent if he did not have at his disposal the $6.445 million agreement, or did not know about it, it did not exist? Respondent replied, "No, your Honor, I'm not telling you that. I am telling you, sitting as Court presiding over this case, that I made full disclosure to The Florida Bar" (TFB Ex. 30, 5) (RR, 36). The referee also found that Respondent knew that the statement was false and that it was material to the inquiries of Judge Wilson, as stated above (RR, 36).

Judge Wilson entered an Order which disqualified Respondent (TFB Ex. 4) and filed an informal inquiry/complaint with The Florida Bar (TFB Ex. 5).

The referee heard the testimony of both Judge Wilson and Respondent on this issue and was able to determine credibility. There is substantial evidence in the record to support his findings of fact and his conclusions of law were correct and certainly not clearly erroneous.

ISSUE IV

THE REFEREE ERRED IN FAILING TO FIND A VIOLATION OF RULE 4-1.7(a) (REPRESENTING ADVERSE INTERESTS)

The Florida Bar reiterates and incorporates herein its brief on this issue as set forth in The Florida Bar's Initial Brief.

It is true that one test of whether or not an attorney-client relationship is established depends upon the reasonable subjective belief of the client.

The referee erred in failing to recognize that, although the secret side agreement states that Respondent had completed all work on behalf of his clients, that was not true. Respondent had not, as of the early morning hours of August 8, 1996, completed all work on behalf of his clients – most clients had no knowledge of the settlement agreement and had not accepted the amounts. Respondent then traveled around the state convincing them to accept the terms (and coercing some of them to do so). In doing so, he intended to keep the secret side agreement confidential and to never sue DuPont again regarding Benlate matters.

It is during this period of time, if not throughout the two years of administration of the hold-back monies, that Respondent was an agent of DuPont. The referee believed that the issue was in the future, that it depends on an intent to work for DuPont on new matters later. That misses the point. He had a conflict of interest with his clients immediately upon signing the secret side agreement up until all work for his clients was actually completed. Throughout this period, there is no doubt that Respondent intended to serve DuPont's interests by keeping the secret side agreement hidden from his clients and the whole world and that he intended to never sue DuPont again regarding Benlate. In return for that, he had bargained for money and had actually received the $6.445

million. As the referee found, Respondent was "protecting his own interest in the share of the prohibited fee and DuPont's economic interests in not having it disclosed to the world that it had paid a law firm in violation of Rule 4-5.6(b) (RR, 26, 27). Respondent was acting as an agent of DuPont, his new client, in protecting their interests up at least until all of his Benlate clients had signed settlement authorizations.

ISSUE V

SHOULD A LAWYER BE DISBARRED WHO MADE A SECRET SIDE AGREEMENT WITH HIS ADVERSARY IN RETURN FOR $6,445,000.00, WHO DID NOT TELL HIS CLIENTS ABOUT IT, AND THEN ENGAGED IN A COVER-UP BY LYING TWICE ABOUT IT TO THE FLORIDA BAR AND THEN LYING ABOUT IT TO A CIRCUIT JUDGE

Respondent has contested his liability in a costly civil litigation and has contested the Bar proceedings. He now wishes to use that as mitigation by pleading poverty.

If Respondent had been candid with Joan Fowler at the meeting in Inverness, he would not have spent years in costly Bar litigation. The fees and costs were due to his own misconduct and he would not have spent years in costly civil litigation if he had been candid with Marc Ossinsky and his clients. Those fees and costs were also due to his own misconduct.

Now, he claims poverty and insists that he has a negative net worth. That is not true. He submitted a financial affidavit to the referee that understated the value of his home by 1 million dollars (TFB Ex. 63). He has a positive net worth.

The Bar is not seeking to take Respondent's home. It wants the prohibited fee (money) to be disgorged so that he will not be unjustly enriched.

In any event, whether Respondent has the ability to pay or not is irrelevant. This Court has ruled that it is an abuse of discretion for the referee to fail to award costs because Respondent has no money. The Florida Bar v. Lechtner, 666 So.2d 892 (Fla. 1996). Although this Court has never had the opportunity to rule regarding forfeiture of a

prohibited fee, the rationale is the same and the result should be the same. To do otherwise would send the wrong message to Florida lawyers and the public, that is, that you can collect a prohibited fee as a result of your misconduct and keep the money! There would be no deterrent effect to Rule 4-5.6(b). It would actually encourage the violation of the rule.

The Florida Bar disagrees with the referee in his conclusion that DuPont's lawyers were the primary wrongdoers. Neither Mr. Lee nor Mr. Shomper failed to tell their clients about the secret side agreement and neither one of them have lied to the Bar or a judge. Mr. Shomper and Mr. Lee are presently being investigated by their state bars.

Respondent cites the case of The Florida Bar v. Mandelkorn, 874 So.2d 1193 (Fla. 2004), in an attempt to show that he should be treated leniently. But, Mandelkorn does not provide *stare decisis* precedent in this case. It is merely a negotiated consent judgment and is reported only in table form. It was never tested in the crucible of trial or appeal and, therefore, has no *stare decisis* value. It is akin to a plea of convenience in criminal proceedings.

A reading of Judge Middlebrook's order published in Adams v. BellSouth Telecommunications, Inc., 2001 WL 34032759 (S.D. Fla., Jan. 29, 2001), establishes that the sanctions imposed by the District Judge upon Mr. Mandelkorn in that proceeding were also a part of a consent judgment (Id at 10), and that the facts forming the basis of Mandelkorn's misconduct were never litigated in the Federal Court proceeding.

Additionally, Mandelkorn had previously been sanctioned by the U.S. District Court for the same misconduct that was the subject of his Bar discipline consent judgment, to the extent that he was required to make a personal $10,000 contribution to the University of Miami School of Law, take a minimum of 20 hours of CLE in ethics, re-take and pass the ethics portion of the Bar Exam, perform 100 hours of pro bono service, agree to be supervised by a senior partner in all federal court litigation for a period of two years and publicly apologize to his former clients. Adams v. BellSouth Telecommunications, Inc., 2000 WL 33941852, (S.D. Fla. Nov. 20, 2000) (adopting the Magistrate's Consent Report, (2000 U.S. Dist. LEXIS 22254). Further, his law firm, Ruden, McCloskey, agreed to make available a fund of $250,000 for distribution to the firm's former clients. Id, 2. It is important to note that these sanctions were a part of a consent judgment adopted by the District Judge in Adams v. BellSouth Telecommunications, Inc., 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001). None of the reported orders contains a description of Mandelkorn's degree of proportional complicity in the misconduct involved, as compared with others that were also sanctioned, although it appears that attorney Norman Ganz was the primary instigator of the restriction on the right to practice. Mandelkorn did write two letters to BellSouth about the matter and, for that reason, in retrospect, The Florida Bar's decision to enter into the consent judgment in the Mandelkorn case was a mistake. The Bar submits that such mistakes should not be repeated.

Respondent next cites the case of The Florida Bar v. King, 174 So.2d 398 (Fla. 1965). In King, the Respondent admitted his misconduct before the referee, gave full disclosure of his participation, and threw himself on the mercy of the referee and this Court for perjury which did not occur in his capacity as an attorney. Bar Counsel agreed with the referee's recommendation of a public reprimand. Mr. King did not engage in a practice restriction or lie to the Bar or the referee in his own disciplinary case. Mr. St. Louis still does not get it. He still protests his innocence and did not throw himself on the mercy of the referee or this Court. The two cases cannot be compared.

Respondent alludes to the cases of Sheehee and Vendittelli, but does not provide even a table report of those cases. They were consent judgment cases, are of no *stare decisis* value, and are not related to this case except that DuPont was involved. They were far less egregious than this case. They should not be considered by the Court.

Respondent next claims that the case of In re Hager, 812 A.2d 904 (D.C. 2002) is more egregious than this case. In Hager, the amount of money received by the lawyer was only $225,000, and the lawyers did not lie to the Bar or a circuit judge.

Respondent did engage, by lying, in a protracted cover-up of his misconduct in entering into the secret side agreement, as the referee found (RR, 37). That cover-up shows a total disregard for the truth and the rules. He should be disbarred. Such misconduct shows an unfitness to practice law.

ISSUE VI

THE REFEREE CORRECTLY DETERMINED THAT THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND COLLATERAL ATTACK ON A PRIOR CONSENT JUDGMENT ARE NOT APPLICABLE TO THE FACTS OF THIS CASE

At motion hearings, the referee heard the arguments as set forth in Respondent's brief. He correctly denied the motions, as there is no identity of facts between this case and the prior 1997 consent judgment and because Respondent lied to The Florida Bar twice about the existence of the secret side agreement and covered it up. Respondent is estopped from raising these doctrines.

Respondent has adopted the arguments of Mr. Rodriguez in related Case No. SC03-909.

In 1997, The Florida Bar investigated informal complaints against Respondent alleging, in substance, that Respondent and his partners had entered into an aggregate settlement of the 20 Benlate claims for $59 million, that they did not communicate with individual clients pertaining to their share of the settlement proceeds, and that Respondent threatened to withdraw on the eve of trial if the clients did not accept the settlement offers and that the firm was keeping the interest on the settlement proceeds deposited in the firm's trust account.

Elena Evans, Bar Counsel, sent Respondent a 15-day letter, and Respondent sent his letter response to her on January 14, 1997. In that letter, Respondent lied to The Florida Bar. He said, "It is therefore disappointing that Mr. Ossinsky would continue to

insist that we have withheld some kind of 'documentation' relating to the settlement negotiations; we simply cannot furnish him with what does not exist" (RR, 29) (TFB Ex. 29, FN9).

The Florida Bar proceeded with the investigation of the then known allegations set forth in the complaints of Mr. Gilley, Mr. Haupt, and Mr. Beasley (RR, 30).

Joan Fowler was assigned as Bar Counsel and Jeannette Haag was assigned as investigating member for the grievance committee (RR, 30) (TR III, 281, 284). In furtherance of the investigation, at the request of Mr. Rodriguez and Respondent, a meeting to take place in Inverness, Florida, was arranged. Joan Fowler asked them to bring all the documents relating to the settlements to the meeting (RR, 30) (TR III, 287). The secret side agreement was in the box that they brought.

The referee found that Respondent did not reveal the secret side agreement to Joan Fowler. She thought she had seen all the documents in the box and believed Respondent (RR, 32). They were charming, forthcoming, solicitous and cooperative. They seemed like really fine gentlemen to her (TR III, 298).

The referee found Respondent guilty of lying to the Bar once again at the meeting in Inverness about the existence of the secret side agreement (RR, 33).

It is true that Joan Fowler had heard rumors from Fred Haupt and Marc Ossinsky that there might be a secret deal, but she testified that she believed Respondent and thought that these rumors were just a "ghost chase" by Mr. Ossinsky (TR III, 315, 316, 386). Since she believed Respondent and Mr. Rodriguez, no further investigation was

necessary. She closed out the investigation and agreed to the 1998 consent judgment (TR III, 315). Respondent attempts to argue that these and other facts show that the Bar knew or should have known about the secret side agreement. Joan Fowler does not have a crystal ball. She was entitled to believe the Respondents as lawyers. The referee found that Respondent lied to her and found no fault with her conduct by giving Respondent the kind of respect and deference that an attorney is entitled to in these types of proceedings (RR, 33).

Respondent raises the issues of collateral attack on a consent judgment, *res judicata*, and collateral estoppel. These are related doctrines, along with the doctrine of splitting causes of action. There is authority that is instructive for this case in the doctrine of splitting causes of action. That rule is not applicable where the plaintiff is prevented from including his entire claim in the original action by the fraud or misrepresentation of the defendant. Restatement (FIRST) of Judgments, §62 (1942). See also §112 American Jurisprudence, Second Edition, VII. Defendant's own conduct may estop him from invoking the rule. Where plaintiff's omission of an item in his cause of action was brought about by defendant's fraud, deception, or wrongful concealment, the former judgment has been held not to be a bar to suit on the omitted part of the claim. Christian v. American Home Assurance Company, 577 P.2d 899, 904 (OK 1977). The same rationale should apply to all of these related doctrines, for they are all designed to protect only honest litigants.

Respondent alleges that *res judicata* should be applied to absolve him of his misconduct.

Respondent's argument can be analogous to a situation in the criminal arena where the state prosecutes a serial rapist for two or three crimes, only to learn later that there were additional rapes that had not become known at the time of the prior prosecution. Under Respondent's argument, the state would then be precluded from further prosecution of the additional, later discovered crimes.

The case of The Florida Bar v. Gentry, 447 So. 2d 1342 (Fla. 1984), dealt with a factual situation in which Gentry was charged with removing client funds from his trust account and placing them in a personal savings account, then pledging those funds as collateral for a personal loan. Gentry argued that the transaction in question had already been the subject of a previous disciplinary proceeding in which he was found guilty and given a private reprimand, and therefore the instant prosecution was barred. This Court held that, since the allegation of the Complaint by The Florida Bar was based on separate, additional and continuing misconduct, there was **no identity of facts** required to bar those proceedings (emphasis added). The Court stated:

> Clearly, the subject matter of the prior disciplinary hearing and the allegations in count one of the complaint do not possess an "identity of facts" required for the application of the *res judicata* doctrine. *See* Gordon v. Gordon, 59 So. 2d 40, (Fla. 1952); *cert. denied*, 344 U.S. 878, 73 S.Ct. 165, 97 L.Ed. 680 (1952). (Id at 1343)

There is no identity of facts between the 1997 consent judgment and the present Complaint.

Respondent argues that this matter is a collateral attack on the 1998 consent judgment, and therefore impermissible. In so arguing, Respondent mistakenly assumes that the Bar wants to set aside the 1998 consent judgment. The 1998 consent judgment was a negotiated resolution of known acts of misconduct consisting of the aggregate settlement of multiple clients' claims, without communication with nor consent of those clients, coupled with the coercive threat that if those clients did not accept the terms of the settlement unilaterally negotiated with Respondent's undisclosed principle, DuPont, Respondent and his firm would withdraw as counsel, leaving the clients unrepresented on the eve of trial.

This matter, conversely, litigates completely separate and distinct acts of misconduct, i.e., the *sub rosa* deal struck between Respondent and his firm with their clients' adversary, DuPont, in which Respondent and his firm benefited to the tune of more than $6.445 million, and the fact that they failed to disclose to their clients the fact that they were attempting thereby to serve two masters.

Respondent takes confidence in this Court's holding in Arrieta-Gimenez v. Arrieta-Negron, 551 So 2d 1184 (Fla. 1989), but his confidence is misplaced. That was a case involving an attempt to set aside a prior consent judgment under Fla. Rule Civ.P. 1.540(b). In this case, the Bar has not done so. It is not seeking to set the 1997 consent judgment aside, but desires that it remain in full force and effect. The Arrieta opinion was a response to a certified question pertaining to Florida law by the United States Court

of Appeals in and for the First Circuit, in which the Federal Appellate Court framed the issue as

> Would the Florida courts give *res judicata* effect to a consent judgment approving a property settlement, if it could be shown more than one year later that one party had fraudulently misrepresented to the other or concealed from the other party information that was material to the settlement? [Arrieta-Gimenez v. Arrieta-Negron, 551 So 2d 1184, 1185 (Fla. 1989).]

This Court responded to the certified question in the affirmative, but differentiated between whether the fraud in question was intrinsic fraud or extrinsic fraud, finding that the conduct in Arrieta amounted to intrinsic fraud and thus the earlier consent judgment in Arrieta was given *res judicata* effect. In its analysis of the nature of the fraudulent conduct involved, this Court looked to its earlier opinion in the case of DeClaire v. Yohanan, 453 So.2d 375 (Fla.1984). The DeClaire opinion establishes that extrinsic fraud involves conduct which is collateral to the issues tried in a case and looked for guidance to the definition of extrinsic fraud as provided in United States v. Throckmorton, 98 U.S. 61, 65-66, 25 L.Ed. 93 (1878), in which the United States Supreme Court said:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side--these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former

> judgment or decree, and open the case for a new and a fair hearing. (Citations omitted.) (Emphasis added.)

The DeClaire opinion goes on to provide

> [T]his Court has defined extrinsic fraud as the prevention of an unsuccessful party [from] presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or the acts of the plaintiff; . . . (Id at 377)

Extrinsic fraud is also defined as some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy. (Citation omitted.) Black's Law Dictionary, Revised Fourth Edition.

There can be no doubt that Respondent's lies to The Florida Bar were extrinsic fraud. The doctrines do not apply to this case, as the referee correctly found.

The doctrine of *res judicata* should not be applied to protect one guilty of fraud, deceit, or misrepresentation. United States Rubber Company v. Lucky Nine, Inc., 159 So.2d 874 (3d DCA Fla. 1964). Since Respondent is guilty of misrepresentations by hiding the secret side agreement from The Florida Bar, *res judicata* is not available to him.

The doctrine of collateral estoppel likewise is not available to Respondent, as that theory is only applicable where the parties are identical and the issues sought to be estopped have been fully litigated. Brown v. State, 397 So.2d 320 (2d DCA Fla. 1981). The matters in the present Complaint concerning Rule 4-5.6(b) were not litigated at all during the 1997 proceedings because Respondent lied.

The referee properly denied Respondent's motions concerning these doctrines.

Respondent, within this issue, also complains that the referee rejected his defense of advice of counsel. After hearing the testimony and considering the case law, the referee ruled that advice of counsel is not a defense to violations of the Rules Regulating The Florida Bar. This is indeed an issue of first impression for this Court as there is no case law on this subject in Florida. As the referee found, other jurisdictions have held that the defense of advice of counsel is not available in Bar proceedings (RR, 43) (TR VI, 640-643) (TFB Ex. 54, 60-62).

The referee further found that:

> Rule 4-5.2(a) states that a lawyer is responsible to follow the Rules of Professional Conduct even if the lawyer is instructed otherwise by another. I agree with the language of People v. Katz, 58 P3d 1176 (Colo. 2002) (incorrectly cited in the Report of Referee as People v. Katz, 58 P2d 1176 (Colo. 2002), wherein the Court said, "It is the individual attorney's duty and obligation to comply with the Rules of Professional Conduct and the attorney may not delegate that duty or responsibility to another under the umbrella of advice of counsel and thereby create a defense to a violation of those rules." Although the Respondent has the right to seek counsel, the ultimate responsibility lies on the Respondent. As a matter of law, the defense of advice of counsel is not available to respondent lawyers in Florida in Bar discipline cases except as provided for in the Rules or as a matter in mitigation (RR, 43).

The Florida Bar requests that this Court adopt language of Katz, supra. However, the advice of counsel defense should not be used as mitigation. Why should a lawyer be permitted to build mitigation in advance by seeking the advice of a lawyer of similar ilk?

The doctrines of *res judicata*, collateral attack on a consent judgment and collateral estoppel are not applicable to the facts of this case and advice of counsel should not be available as a defense in Bar discipline proceedings in Florida for any purpose.

ISSUE VII

RESPONDENT SHOULD NOT BE ALLOWED TO BE UNJUSTLY ENRICHED BY RETAINING THE PROHIBITED FEE

It is not a fact that Respondent has a negative net worth. His financial statement underestimated the value of his home by $1 million. He valued his house at $1,700,000.00, but the appraisal that the Bar had done reveals that it is worth $2,700,000.00 (TFB Ex. 63). He is in the black. And the referee found that he could pay under a payment schedule.

In any event, whether Respondent has the ability to pay or not is irrelevant. This Court has ruled that it is an abuse of discretion for the referee to fail to award costs because a Respondent has no money. Lechtner, supra. Although this Court has never had the occasion to rule regarding forfeiture of a prohibited fee, the rationale is the same and result should be the same. To do otherwise would send the wrong message to Florida lawyers and the public. May a lawyer be unjustly enriched by violating a rule and then keep the money? If so, that encourages a violation of Rule 4-5.6(b).

Rule 3-5.1(h) (Forfeiture of Fees) states:

> An order of the Supreme Court of Florida or a report of minor misconduct adjudicating a respondent guilty of entering into, charging, or collecting a fee prohibited by the Rules Regulating The Florida Bar may order the respondent to forfeit the fee or any part thereof. In the case of a clearly excessive fee, the excessive amount of the fee may be ordered returned to the client, and a fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to The Florida Bar Client's Security Fund and disbursed in accordance with the rules and regulations.

Clearly, the referee was within his authority under this rule to recommend the forfeiture of the fee which he found to be a prohibited fee in violation of Rule 4-5.6(b) and Rule 4-1.5(a) (RR, 28).

The forfeiture recommended by the referee does not represent inconsistent treatment. The referee was concerned about that issue and learned that the opposite is true. Both Ms. Ferraro and Mr. Friedman disgorged their share of the $6.445 million prohibited fee by voluntarily paying restitution to the clients, minus the taxes they paid on their share. Ms. Ferraro paid $425,000 (her consent judgment is attached hereto as Exhibit A) and Mr. Freidman paid $910,000 (his consent judgment is attached hereto as Exhibit B).

Mr. Rodriguez thus far has not disgorged his prohibited fee because the referee in that case ruled incorrectly that it would be a fine, and relied upon the case of The Florida Bar v. Frederick, 756 So.2d 79 (Fla. 2000). The Frederick case has nothing to do with prohibited fees. It is a restitution case. The referee in this case ruled correctly that the Frederick case is not applicable to this case (RR, 48).

Respondent argues that the provisions of R. Regulating Fla. Bar 3-5.1(h), which was adopted in 1990 as a part of The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar – Advertising Issues, 571 So.2d 451 (Fla. 1990), should be limited to forfeiture of prohibited fees that have been realized as a result of advertising rule violations, without reference to any rationale supporting such a limitation, other than

the fact that the amendment was a part of the advertising rule amendment package. Why should the forfeiture of prohibited fees be limited to such a narrow sector, when the principle embraced by the rule amended should apply to any form of ill-gotten fee, regardless of its source? There is nothing in the language of the rule itself that so limits it application, but Respondent argues that such a limitation should be implicitly read into the rule because of the method of its adoption. Rule 3-5.1(h) is a "Type of Discipline." It is within Chapter 3, Rules of Discipline. It is not included within the advertising rules contained in Chapter 4 of the Rules of Professional Conduct. Clearly, Rule 3-5.1(h) was intended to have application to all forms of discipline.

The Florida Bar is not seeking that Respondent forfeit this fee in order to punish him. This is discipline of his license, not punishment. It is not penal. Debock v. State, 512 So.2d 164 (Fla. 1987). Nor is it a "back door" way to accomplish disbarment. The Florida Bar does not seek Respondent's home but seeks that he disgorge the money to prevent unjust enrichment.

Respondent argues that the forfeiture is unconstitutional and cites the cases of United States v. One 1976 Mercedes Benz, 618 F.2d 453 (7th Cir. 1980), and United States v. Bajakajian, 524 U.S. 321 (1998). In One 1976 Mercedes Benz, the government sought to have forfeited an automobile that he lawfully owned but used to transport narcotics and held that the defendant was entitled to a jury trial. That case is inapposite to this case, as Mr. St. Louis did not lawfully own the money. He was prohibited from taking it in the first place and The Florida Bar is not seeking forfeiture of his home or his

car or any thing of that nature. Respondent did litigate this entire matter before the referee and did argue these cases before him, but the referee rejected those arguments. He had his day in court.

The Bajakajian case, supra, is likewise inapposite to this case. In Bajakajian, the defendant attempted to take $357,144 out of the country in violation of 31 U.S.C. §5316(a)(1)(A) because he failed to report that he was transporting more than $10,000 in currency. The Court held that it was punishment for a crime and was therefore a fine and subject to the Excessive Fines Clause. U.S. Const. Amend. VIII. The Court also held that a punitive forfeiture must be proportionate to the gravity of the defendant's defense.

First of all, this case is not punitive and does not therefore involve a fine, as discussed above. The forfeiture of the prohibited fee payments, under the 10-year plan, total exactly the same amount, less the taxes he paid, that he unjustly received as a result of his misconduct. It is therefore proportionate to the gravamen of the violation. Even if this were considered to be a fine, which it is not, it would not violate the Excessive Fines Clause of the Eighth Amendment.

The referee is required to consider deterrence as a factor in recommending discipline. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984). The referee thought very carefully about this issue and determined that the forfeiture was necessary to deter other lawyers (RR 44, FN17).

Respondent has failed to show that the forfeiture of the prohibited fee is unconstitutional.

By whatever method, this prohibited fee must be disgorged. If the Court finds that forfeiture of a prohibited fee is not contemplated within Rule 3-5.1(h), then the Court should order disgorgement as a condition of reapplication for admission or reinstatement. Such a solution was found by the Court in In Re Hager, 812 A.2d 904 (DC 2002) since they did not have a rule equivalent to Rule 3-5.1(h), Rules Regulating The Florida Bar.

ISSUE VIII

REFEREE CORRECTLY DECIDED THAT THE RULE OF LENITY DOES NOT APPLY IN THIS CASE

Respondent here, as before the referee, argues that the rule of lenity should apply in this case and that, therefore, he has not violated Rule 4-5.6(b), Rules Regulating The Florida Bar.

Rule 4-5.6(b) states: "A lawyer shall not participate in offering or making: (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

The referee heard the testimony of Professor Bruce Winick, Respondent's expert in the field of constitutional law, who opined that, although there is no authority to apply the rule of lenity to Bar discipline cases, as it is from the criminal law, it is his opinion that it should be applied in this case (TR VIII, 990). After hearing this testimony, the referee declined to apply the rule of lenity.

The referee's ruling was correct.

All of the cases cited by Respondent in his brief are criminal law cases. The rule of lenity applies only to statutes that define criminal offenses. Jones v. State, 728 So.2d 788 (Fla. 1st DCA 1999).

Even in the area of criminal law, the rule of lenity only applies to construction of criminal statutes if the statute is ambiguous. State v. Cook, 905 So.2d 1013 (2d DCA 2005). Rule 4-5.6(b), Rules Regulating The Florida Bar, is not ambiguous. Respondent

is attempting to raise the rule of lenity in order to establish an ambiguity when none exists. That is not a legitimate purpose for the rule of lenity.

Rule 4-5.6(b) is narrowly drafted, and the language is clear and understandable by all lawyers. It is a "shall not" rule, as that language is included in the rule itself. It is a mandatory, bright line rule (TR VI, 605).

It is not a discretionary rule, so clearly the language in the Preamble to the Rules of Professional Conduct create no ambiguity when read together with Rule 4-5.6(b). The referee even compared Rule 4-5.6(b) to the "thou shalt not" rules of the Ten Commandments (TR 15, 1949). It is also a "prohibited" conduct rule, as the word prohibited is included in the comment to the rule. Where is the ambiguity?

Respondent admits that, on the night that he signed the secret side agreement, the case of Lee v. Department of Insurance and Treasurer, 586 So.2d 1185 (Fla. 1st DCA 1991), gave virtually no guidance on the application of the rule. Then how can he use it as an excuse for his misconduct? The court in Lee dealt with the enforceability of contracts and specifically ruled that an ethical violation of Rule 4-5.6(b) was not the issue in that proceeding. Id at 1187. There was plenty of authority at the time that clearly condemned this behavior. Adams v. BellSouth Telecommunications, Inc., 2001 WL 34032759 (S.D. Fla. Jan. 19, 2001) (citing ABA opinions that were in existence at the time).

Rule 4-5.6(b) itself was plenty of guidance. It is absolutely clear. Respondent tried to circumvent the rule, but it did not work.

Respondent says that the referee should not have considered cases decided subsequent to his misconduct in evaluating his actions on the night of August 7, 1966. BellSouth itself was concerned with conduct which occurred in 1997, near the time of the misconduct in this case. If Respondent's position is accepted, then it would mean that this Court may not consider case law interpreting Rule 4-5.6(b) that was decided after 1996! His argument has no merit.

The referee heard the evidence and the testimony and found Respondent guilty of violating Rule 4-5.6(b). His ruling was correct and is not "clearly erroneous."

ISSUE IX

THE REFEREE CORRECTLY FOUND THAT THE DEFENSES OF DURESS, NECESSITY, AND COERCION DO NOT APPLY TO THIS CASE

Respondent cites no authority to support his argument that the defenses of duress, necessity and coercion are defenses to violations of the Rules Regulating The Florida Bar. Bar Counsel is also unable to find any such authority.

At the final hearing, the referee heard the testimony of Professor Bruce Winick on this issue, but rejected those opinions. The referee stated: "Duress, coercion, necessity. I think the only thing left out was entrapment. That might have had more relationship to the facts" (TR 15, 1947). The referee also ruled that "the devil made me do it is not a defense" (TR 15, 1948).

The referee also ruled, as a matter of law, that "the fear of not receiving money can not be the basis for a claim of duress. The fact that the settlement had to be finalized that night is not necessity, nor is it coercion." He also ruled that "neither duress, coercion, nor necessity are viable defenses to this rule violation under these facts" (RR, 42).

Respondent and Mr. Rodriguez were negotiating on the night of August 7, 1966, from a position of strength. They had DuPont in fear of public disclosure of Judge Donner's order. Respondent was very hardnosed in his negotiations (TR III, 456). Mr. St. Louis was the one who first asked for $10-12 million in return for the secret side agreement. He "held his ground" and got $30 million for his client, Davis Tree Farms

(TR III, 457). The $6.445 million was a negotiated amount (TR III, 461). Respondent was the one who first demanded payment for the secret deal (TR III, 446). He was driving the process (TR III, 460). How can this be coercion? The referee found that Respondent was looking after his own interests in his share of the $6.445 million. Where is the economic necessity? Time pressure is not duress.

Trial lawyers are always under deadlines and stress. They cannot be allowed to use these as defenses to a violation of Bar rules. In this case, they are not even defenses, but mere lame excuses.

The referee's ruling was clearly correct and not erroneous.

ISSUE X

RULE 4-5.6(b), RULES REGULATING THE FLORIDA BAR IS A CONSTITUTIONAL RULE, A GOOD RULE, AND SHOULD BE ENFORCED

Rule 4-5.6(b) states: "A lawyer shall not participate in offering or making: (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."

Respondent, in his brief, contends that the rule is unconstitutional because it is ambiguous, lacks a reasonable relation to a legitimate purpose, and represents a "taking" of a lawyer's liberty or property rights without due process and adequate compensation.

Respondent suggests that because some professors have criticized the rule, that it is unconstitutional, but cites no authority for that notion, and the views of Professor Gillers were specifically rejected by the court in Adams, supra. Professor Gillers had published an article in the ABA Journal, Steven Gillers, A Rule Without a Reason, A.B.A.J. Oct. 1993 at 118. Respondent's expert witness on constitutional law at the final hearing admitted that Professor Giller's views have not been adopted in Florida (TRB 9, 1069).

The Adams court made an excellent analysis of the background of the rule and the public policy reasons for the rule and cited ABA Formal Op. 93-371, which sets forth the policy goals behind Rule 4-5.6(b) as follows:

> The rationale of the Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. . . . Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their

> claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of future clients.

The referee heard the testimony of Respondent's expert witness on constitutional law, Professor Winick, and rejected Respondent's contentions and found "that the rule is constitutional on its face and the policy reasons cited for the rule apply to this case" (RR, 41). He further found that "By its ultimatum that the firm be retained, DuPont effectively made Mr. St. Louis, quite possibly one of the most, if not the most qualified Benlate plaintiffs lawyer, unavailable to future clients. Mr. St. Louis' own witnesses testified that his Benlate clients received offers that far exceeded the value of their claims. His clients were thereby overcompensated, probably at the expense of potential Benlate clients not yet represented by qualified counsel. I find that Rule 4-5.6(b) is constitutional as applied" (RR, 42).

The referee also found "I can't think of three more appropriate reasons for a rule that fit in every aspect of this case" (TR 15, 1944). "So, it's clear that it is constitutional as applied" (TR 15, 1945). "I think it's a good rule, a constitutional rule, and one that should be enforced" (TR 15, 1946).

Art. V §15, Fla. Const. grants to the Supreme Court of Florida exclusive jurisdiction to regulate the discipline of lawyers. Pursuant to that power, the Supreme Court of Florida has promulgated the Rules Regulating The Florida Bar, and one of those rules is Rule 4-5.6(b) (Restriction on the Right to Practice). The State of Florida has a

compelling interest in regulating the practice of law. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 912 (1978). Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975).

Respondent contends that the rule is ambiguous, lacks a reasonable relation to a legitimate purpose, and represents the taking of a lawyer's liberty or property rights. The ambiguity that Respondent alleges can be summarized by the testimony of Professor Winick, who believes that the rule is constitutional on its face but not in its application to this case. Certainly, the language of the rule is simple, clear, uses ordinary language and is easily understandable by lawyers and is narrowly drawn. No part of the rule conflicts with any other part of the rule. Professor Winick admitted that the spirit of the rule was violated by Respondent (TR VIII, 981). He believes that the ambiguity is because Professor Chinaris at one time thought that the lawyers in Adams, supra, had not violated the rule, and because the Preamble to the Rules of Professional Conduct, when read together with Rule 4-5.6(b) creates an ambiguity, and because the language of the secret side agreement is itself ambiguous, and because the Lee case, supra, was the only case law on the subject of a practice restriction in 1996. As discussed above, the Lee case specifically stated that ethics were a separate matter which the court declined to address.

None of the above reasons set forth by Professor Winick create any ambiguity whatsoever. Because a professor at one time opined that lawyers in another case had not violated the rule does not amount to ambiguity in the rule. The fact that appellate courts may differ in their interpretations of a statute alone does not render a statute ambiguous.

Seagrove v. State, 802 So.2d 281 (Fla. 2001). Because professors disagree likewise creates no ambiguity.

The Preamble to the Rules of Professional Conduct does state:

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and the law itself. Some of the rules are imperatives, cast in terms of "shall" or "shall not." These define proper conduct. Others, generally cast in the term "may" are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when a lawyer chooses not to act or to act within the bounds of discretion.

When the Preamble and Rule 4-5.6(b) are read together, there is no ambiguity. Rule 4-5.6(b) is a "shall not" rule, a mandatory rule, and a rule which the comment says is "prohibited" conduct. The Preamble shows that a lawyer has no discretion under Rule 4-5.6(b). What is ambiguous?

Next, Respondent and Professor Winick allege that the rule restricts a liberty interest in practicing law in violation of the due process clause of the Fifth and Fourteenth Amendments, and there is no reasonable relation to the purpose (TR VIII, 1017). Professor Winick and Respondent somehow believe that Rule 4-5.6(b) places a restriction on lawyers. The opposite is the case. It frees lawyers from attempted restrictions sought to be imposed upon them by tortious corporations.

Professor Winick also opined that the test for constitutionality would be intermediate scrutiny, that is, a reasonable relation between the state's purposes and the liberty to practice one's profession (TR VIII, 1019). There is certainly a reasonable

relationship between the purposes of the rule and the application of the rule here, as the referee found, even if the rule were to be incorrectly viewed as placing some sort of restriction on lawyers the rule passes constitutional muster.

Professor Winick assumes that Respondent has a right to practice law and testified that, in his opinion, the language of the cases of this Court that say that the practice of law is a privilege is "baloney" (TR 9, 1131). As far back as 1917, the practice of law has been held to be a privilege burdened with conditions. In Re Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917). See also, Petition of Wolf, 257 So.2d 547, 548 (Fla. 1972), Debock v. State, 512 So.2d 164, 168 (Fla. 1987). Reasonable restrictions may be placed on that privilege.

Respondent next asserts that the rule takes his property without due process and compensation. What property does it take? The prohibited fee? That is not his property and he has no right to it. He received it by violating the rules and it must be disgorged. He does not own that money and never did own it.

Rule 4-5.6(b) does not take Respondent's liberty. It gives him liberty – the liberty to be free of the restrictions that tortious corporations may try to impose upon his practice.

Rule 4-5.6(b) is constitutional under the three-prong intermediate scrutiny test of Central Hudson Gas & Electric Corporation v. Public Service Comm'n of New York, 447 U.S. 577, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), because 1) the State has a

compelling interest in regulating lawyers and in preventing practice restrictions, 2) the rule directly and materially advances that interest, and 3) the rule is narrowly drawn.

Rule 4-5.6(b) is constitutional and the referee's ruling is correct. It is a good rule and one which must be strictly enforced.

CONCLUSION

The Court should affirm the referee's findings regarding guilt, but find Respondent also guilty of a violation of Rule 4-1.7(a) and should impose the sanctions of disbarment, forfeiture of the prohibited fee of $2,277,663.00 as recommended by the referee's 10-year payment plan, and to pay the costs incurred by The Florida Bar in the amount of $72,318.37.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief and Answer Brief on Cross Appeal regarding Supreme Court Case No. SC04-49, TFB File No. 2001-00,356(8B), has been mailed by certified mail # 7004 1160 0004 5673 8420, return receipt requested, to Roland Raymond St. Louis, Jr., Respondent, whose record Bar address is The Colonnade, Suite R-60, 2333 Ponce de Leon Boulevard, Coral Cables, Florida 33134, on this 3rd day of October, 2005.

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Copy provided to:
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Reply Brief and Answer Brief on Cross Appeal is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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James A.G. Davey, Jr., Bar Counsel